BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KAREN E. BOYCE Claimant VS. **BLACKBOB PET HOSPITAL CHARTERED** Respondent AND **FIRSTCOMP INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,061,806

ORDER

Claimant requests review of Administrative Law Judge Kenneth J. Hursh's October 16, 2012 preliminary hearing Order. Timothy E. Power of Overland Park, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and insurance carrier (respondent).

Claimant's application for hearing alleges injury to claimant's neck and left shoulder on August 24, 2011; or alternatively, repetitive trauma from August 24, 2011 and each and every working day thereafter. Judge Hursh denied claimant's request for medical benefits because she failed to prove injury by repetitive trauma, failed to prove accidental injury on August 24, 2011, and failed to provide timely notice.

The record on appeal is the same as considered by Judge Hursh and consists of the October 15, 2012 preliminary hearing transcript, with exhibits, and all pleadings contained in the administrative file.

ISSUES

Claimant asserts Judge Hursh erred in finding she failed to prove injury by repetitive trauma. Claimant argues the repetitive activities performed at work are not activities of normal day-to-day living and therefore would constitute repetitive trauma under K.S.A. 44-508(f)(2)(a). Furthermore, claimant asserts Judge Hursh improperly found claimant did not prove repetitive trauma because the only medical evidence regarding prevailing factor was provided by Dr. Zimmerman, who concluded claimant's initial accident in August 2011 and her ongoing work activities were the prevailing factor in claimant's injuries. Finally, claimant asserts Judge Hursh erred in finding she did not provide timely notice.

Respondent argues Judge Hursh's decision should be affirmed.

The issues raised on review are:

1. Did claimant sustain an accident or injury by repetitive trauma arising out of and in the course of her employment? If so, was her accident or repetitive work the prevailing factor in her injury and need for medical treatment?

2. Did claimant provide timely notice?

FINDINGS OF FACT

Claimant is employed as a receptionist for respondent. She makes appointments, checks clients in and out, takes or carries pets to where they need to be in the clinic, puts dogs on leashes and sells pet food. She carries bags of dog food, weighing between four and 37.5 pounds, to clients' vehicles, two to four times per day.

On August 24, 2011, claimant lifted two bags of dog food, weighing 37.5 pounds each, and put them on her shoulder. She heard a little pop in her neck. Claimant did not initially think this incident was a concern and finished working, but testified she knew then that her physical problems were due to lifting the dog food at work that day.

The next morning, claimant felt pain in her shoulder and neck while feeding her dogs at home. She stopped at Starbucks and noticed more shoulder pain. She got to work and told her supervisor, Linda Croslin, that she thought she had hurt herself, but did not relate her injury to work. Ms. Croslin testified claimant said she did not know why she was hurt, but had turned funny and sharp pain started when she was at Starbucks.

Later that morning, claimant went to Olathe Medical Center (OMC). She was seen by a nurse practitioner, Ashley Ahring. Claimant complained as follows:

> **Additional Information:** 08/25/11 8:21 Chief Complaint Sudden onset left neck, shoulder[,] upper left chest pain this morning after turning her body at Starbucks. Pain much worse with movement, deep breathing.
>
> **History of Present Illness**
> The patient presents with neck pain and [she] developed sudden pain in her left side of her neck, radiating into her left shoulder, chest and upper back this a[.]m. She noticed it slightly after she fed her dogs this a[.]m[.], but then when she went to [S]tarbuck's [sic], she turned her head and had sudden sharp pain. It is worse w/any neck movement and movement of the left shoulder. She has no numbness/tingling, no [headache], no dizziness. She has not had this before, but has noticed some left shoulder pains after carrying heavy bags of dog food at her Vet Clinic where she works.[1]

[1] P.H. Trans., Resp. Ex. A at 1.

The OMC does not indicate when claimant previously noted left shoulder pain associated with lifting bags of dog food, but claimant testified she told OMC personnel she hurt herself lifting bags of dog food on August 24, 2011. Claimant was diagnosed with neck strain and cervical radiculopathy. Claimant testified she was released with no restrictions. Claimant testified she continued to work and her condition worsened.

On April 4, 2012, claimant was seen by a physician's assistant, Shalla Proctor, at Arbor Creek Family Care (Arbor Creek). She complained of left shoulder pain for about three weeks, heartburn since the previous day, jaw pain since that morning, constant tingling down her arm and hand and random sharp shooting pain. The history included, "Slings bags of dog food at work and thought pulled muscle."[2] Claimant was diagnosed with acid reflux and left shoulder tendonitis and was prescribed cyclobenzaprine, acetaminophen-codeine, and omeprazole and released without restrictions.

On or about April 4 or 5, 2012, claimant notified Ms. Croslin that her condition related back to a lifting incident at work on August 24, 2011: "At that time is when I told Linda that I thought it was due to lifting the dog food bag and that it was work related" and the injury occurred on "that date."[3] Ms. Croslin testified claimant said, "I think this is all related back . . . to August when I lifted" and "I think this is all related back to August when I went to the emergency room"[4] from lifting those bags of food. Claimant did not tell Ms. Croslin she sustained repetitive injuries every day when at work.

Respondent completed an accident report. Claimant quit carrying heavier bags of dog food in early-April 2012 and only occasionally picked up dogs thereafter. While Ms. Croslin does not observe claimant all day long, she did not notice claimant having any difficulty performing work between August 25, 2011, and April 2012.

On April 11, 2012, claimant returned to Ms. Proctor with continued left shoulder pain and tingling to her fingers. Claimant's diagnosis was left shoulder tendonitis. Ms. Proctor ordered a left shoulder MRI, which was performed on April 13, 2012. The MRI report stated, "Pain after lifting injury."[5] The MRI showed mild rotator cuff tendinopathy with no evidence of full thickness tear or significant partial thickness defect, mild subacromial/subdeltoid bursitis, mild acromioclavicular joint arthropathy and mild biceps tendinosis. Claimant still had no restrictions. Claimant testified her condition worsened with continued work from April 2012 forward.

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[2] *Id.*, Cl. Ex. 4 at 1.

[3] *Id.,* at 11-12.

[4] *Id.,* at 40-41.

[5] *Id.*, Cl. Ex. 2 at 1.

Claimant returned to Ms. Proctor on July 11, 2012. She complained of difficulty focusing her eyes, blurry vision, intermittent left arm numbness to her hand and head pressure. Claimant denied left shoulder tenderness. Diagnoses included headache, numbness and vision changes. Ms. Proctor ordered MRI scans of the brain and cervical spine. Claimant was prescribed omeprazole and released with no restrictions.

Claimant testified her July 2012 symptoms were different than her August 2011 symptoms. Ms. Croslin noticed claimant appearing uncomfortable with head and shoulder pain, in addition to difficulty focusing between April and July 2012.

The cervical spine MRI was performed July 13, 2012. The MRI showed a moderate sized left-sided disk protrustion at C6-7.

Daniel D. Zimmerman, M.D., evaluated claimant on September 7, 2012, at her attorney's request. Dr. Zimmerman's report indicated claimant was injured from having slung two 37.5 pound bags of dog food over her left shoulder. Dr. Zimmerman's report states, "Mrs. Boyce developed pain and discomfort affecting the cervical spine and left shoulder on or about August 24, 2011 in carrying out work duties in her employment at the Blackbob Pet Hospital" and she had "continuing pain and discomfort affecting the cervical spine and left upper extremity in continuing to carry out work duties in her employment at the Blackbob Pet Hospital."[6] Dr. Zimmerman's report made no mention of what claimant did on a repetitive basis at work. Dr. Zimmerman's report made no mention of claimant discontinuing lifting bags of dog food in early-April, 2012.

Dr. Zimmerman opined claimant sustained cervical spine and left shoulder injuries at work on August 24, 2011, and each and every day thereafter in carrying out her work duties. He did not provide any work restrictions. Dr. Zimmerman diagnosed claimant with a cervical disk herniation, as well as a possible full thickness rotator cuff tear and/or frozen shoulder syndrome, and recommended claimant be seen by an orthopedist and neurosurgeon. Dr. Zimmerman opined, "The prevailing factor for the cervical disc herniation and the frozen shoulder syndrome and/or rotator cuff tear affecting the left shoulder is the accident that occurred on or about August 24, 2011 and each and every day thereafter in carrying out work duties in [claimant's] employment at Blackbob Pet Hospital."[7] Dr. Zimmerman was the only doctor to diagnose claimant with a work-related condition.

Ms. Croslin testified she thought claimant's condition worsened between July 2012 and the time of the October 15, 2012 preliminary hearing.

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[6] *Id.*, Cl. Ex. 1 at 2.

[7] *Id.*, Cl. Ex. 1 at 2, 7.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides, in part:

(c) The burden of proof shall be on claimant to establish claimant's right to an award of compensation and to prove the various conditions on which claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) ‘‘Repetitive trauma’’ refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ‘‘Repetitive trauma’’ shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is

more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-520 states in part:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

An employer is liable to pay compensation where the employee incurs personal injury by repetitive trauma arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[9] The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[10]

The Board's jurisdiction to review a preliminary hearing is limited to: (1) did claimant suffer injury by accident or repetitive trauma; (2) did the injury arise out of and in the course of employment; (3) did claimant provide proper notice; (4) do certain defenses apply, and where it is alleged the administrative law judge exceeded his or her jurisdiction.[11]

ANALYSIS

This Board Member concludes claimant was injured at work on August 24, 2011 when lifting two bags of dog food over her left shoulder and the prevailing factor in her injury and need for medical treatment was her August 24, 2011 accident.

The OMC record is equivocal in addressing how claimant was injured, as it mentions she was injured feeding her own dogs and turning her head suddenly at Starbucks on August 25, 2011, in addition to noticing left shoulder pain carrying dog food bags at work. This Board Member is uncertain as to the significance of the non-work events on August 25, 2011, but finds the evidence points to an August 24, 2011 accident. Claimant testified she was hurt on August 24, 2011. She told Ms. Croslin she was hurt on August 24, 2011. Dr. Zimmerman noted claimant was injured from lifting two 37.5 pound bags of dog food on or about August 24, 2011. Claimant also testified:

> Q. My question is, ma'am, you knew on August 24th that something you did at work caused all these problems you're having; right?
>
> A. I knew that lifting the dog food had probably caused it, yes.[12]

While this Board Member finds claimant suffered an accidental injury on August 24, 2011, she failed to prove timely notice of such accidental injury. Therefore, any claim based on the August 24, 2011 accident is denied.

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[8] K.S.A. 2011 Supp. 44-501b(b).

[9] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, Syl. ¶ 3, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[10] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[11] K.S.A. 2011 Supp. 44-534a(a)(2); K.S.A. 2010 Supp. 44-551(i)(2)(A).

[12] P.H. Trans. at 24-25.

Regarding injury by repetitive trauma, her date of injury for injury by repetitive trauma, assuming she was injured due to repetitive work, would be on or about September 7, 2012, when she was alerted by Dr. Zimmerman her condition was due to repetitive duties. Claimant needed to provide notice within 20 days from seeking medical treatment for her injury by repetitive trauma[13] or 30 days from the date of injury by repetitive trauma, whichever came first. Whether notice provided by claimant was timely depends on the date of injury by repetitive trauma, which is a legal fiction.[14]

The date of injury by repetitive trauma is based on the earliest of several triggering events listed in K.S.A. 2011 Supp. 44-508(e), as noted on page seven. The first two considerations for an injury date are based on when claimant is taken off work or provided modified/restricted duties due to diagnosed repetitive trauma. Claimant was never taken off work or restricted due to diagnosed repetitive trauma.

Another possible injury date is when a physician first told claimant her condition was work-related. Dr. Zimmerman was the first physician to advise claimant her condition was work related. Therefore, claimant's date of injury by repetitive trauma, assuming she proved she was hurt due to repetitive work, was when Dr. Zimmerman advised claimant her condition was work-related, which was on or about September 7, 2012.

Notice must include the time, date, place, person injured and the particulars of such injury. When claimant provided notice, she advised Ms. Croslin she was hurt on August 24, 2011. Notice of a single accident date is not sufficient notice for injury by repetitive trauma. However, claimant's attorney provided sufficient notice through his August 2, 2012 letter to respondent and filing the application for hearing shortly thereafter.

Notice may be provided prior to claimant's legal date of injury by repetitive trauma.[15] The notice statute does not require notice of injury after the legal date of injury, when claimant has already provided notice during the series of microtraumas.

Despite proper notice for injury by repetitive trauma, this Board Member finds claimant did not prove injury by repetitive trauma. Claimant vaguely testified having increased symptoms as she continued to work, but her work duties do not appear sufficient

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[13] The 20 days notice requirement means 20 days from the date claimant sought medical treatment for the repetitive trauma injury after the date of injury by repetitive trauma has been established. See *Shields v. Mid Continental Restoration*, No. 1,059,870, 2012 WL 4763702 (Kan. WCAB Sep. 19, 2012).

[14] *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

[15] *Whisenand v. Standard Motor Products*, No. 1,056,966, 2012 WL 369779 (Kan. WCAB Jan. 23, 2012); see also the application of the predecessor statute in *Hunt v. Integrated Solutions, Inc.*, No. 1,046,939, 2010 WL 1918584 (Kan. WCAB Apr. 14, 2010) ("Admittedly, it seems unusual to conclude an injured employee gave notice of an accident that had yet to occur. Yet, that is a function of the legal fiction that results in cases of microtraumas and the terms of K.S.A. 44-508(d).").

to cause cumulative trauma or microtraumas. Her job duties did not involve repetitively slinging bags of dog food. She is a receptionist. Her testimony demonstrated her work rarely involved anything particularly repetitive or heavy. She would lift bags of dog food between two and four times per day. This work is not normal activity of day-to-day living, but the record does not establish claimant's job duties caused repetitive injury.

The majority of the medical records do not support an ongoing injury by repetitive trauma. While Dr. Zimmerman indicated claimant had injury each and every working day from doing her work, he did not state what job duties claimant ever performed on a repetitive basis or illuminate how she was injured due to repetitive activity. He mentioned claimant lifted or slung bags of dog food, but it is unclear if he meant she did so on August 24, 2011 or on a repetitive basis. It is unclear if Dr. Zimmerman knew she only performed this task four or fewer times per day or whether some bags of dog food only weighed four pounds. Merely stating claimant had pain and discomfort from doing work, without addressing what job duties claimant repetitively performed to cause injury is insufficient proof of injury by repetitive trauma. Based on the record to date, claimant has not met her burden of proving injury by repetitive trauma.

Additionally, claimant having pain and discomfort while performing work does not necessarily equate with injury by repetitive trauma. She hurt herself on August 24, 2011. Once the damage was done on August 24, 2011, it would make sense claimant would have ongoing pain and discomfort.

This Board Member does not find claimant's injury or injuries are a result of repetitive use, cumulative trauma or microtraumas. Claimant's accidental injury occurred on August 24, 2011.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the October 16, 2012 preliminary hearing Order of Judge Kenneth J. Hursh is reversed to the extent he ruled claimant failed to prove an August 24, 2011 accident and reversed to the extent he ruled claimant's job duties were activities of normal life, but affirmed based on his ruling claimant failed to provide timely notice of her August 24, 2011 accident and her failure to prove injury by repetitive trauma.

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[16] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of December, 2012.

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HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

cc: Timothy E. Power, Attorney for Claimant
Redlaw2@aol.com

Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Ron@LaskowskiLaw.com

Honorable Kenneth J. Hursh, Administrative Law Judge